FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v PRIMROSE DEVELOPMENT COMPANY PTY LTD & ANOR *[2009] FMCA 632*

INDUSTRIAL LAW – Application for declarations and civil penalty – workplace agreements – duress – breaches admitted – considerations as to penalty.

Workplace Relations Act 1996 (Cth) ss.166, 167, 342, 400, 407 , 413, 792, 807
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) sch18
Fair Work Act 2009 (Cth)
Crimes Act 1914 (Cth) s.4(1)

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Mornington Inn v Jordan [2008] FCAFC 70
Schanka v Employment National (Administration) Pty Ltd 92 IR 464
Canturi v Sita Coaches Pty Ltd (2002) 116 FCR 276
Maritime Union of Australia v Geraldton Port Authorities (1999) 93 FCR 34
Bishop v Ropolo Services Pty Ltd (2006) 153 FCR 357
Granada Tavern v Smith [2008] FCA 646
Rojas v Esselte Australia Pty Ltd (No 2) [2008] FCA 1585
Byrne v KNL Group Pty Ltd & Anor [2008] FMCA 1440
Glenn Jordan v Mornington Inn Proprietary Limited [2007] FCA 1384
Vonarx v Squaw Valley Pty Ltd [2008] FMCA 212
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Carr v Automotive, Food, Metals, Engineering Printing and Kindred Industries Union [2005] FCA 1802
Mill v The Queen (1988) 166 CLR 59
Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd (No.2) (2005) 215 ALR 281
Alfred v Walter Construction Group Ltd [2005] FCA 497
Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [2001] ATPR 41 – 815
Trade Practices Commission v CSR Limited (1991) ATPR 41 – 076
Community and Public Sector Union v Telstra Corporation [2001] FCA 1364
Johnson v R [2004] 205 ALR 346
Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170

Schanka v Employment National (No. 2) (2001) 114 FCR 379
Olsen v Sterling Crown Pty Ltd (2008) 177 IR 337
Pearce & The Queen (1998) 194 CLR 610

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	PRIMROSE DEVELOPMENT COMPANY PTY LTD (ACN 062 713 811)
Second Respondent:	JUDITH SIMMONDS
File Number:	LNG 1 of 2009
Judgment of:	O'Sullivan FM
Hearing date:	3 July 2009
Date of Last Submission:	3 July 2009
Delivered at:	Melbourne (via telephone link)
Delivered on:	7 July 2009

REPRESENTATION

Counsel for the Applicant:	Mr J. Snaden
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondent:	Mr A. Young
Solicitors for the Respondent:	Simmons Wolfhagen

IT IS ORDERED BY CONSENT THAT:

(1) The name of the applicant be changed to the Fair Work Ombudsman.

IT IS DECLARED THAT:

(2) On or around March 2007 the first respondent contravened s.400(5) of the WR Act in respect of:

(a) Sally Holmes;

(b) Hannah Hughes;

(c) Jarad Hughes;

(d) Millicent Derrick;

(e) Sally Dwyer;

(f) Stacey Hickey;

(g) Kate Allen;

(h) Nicole Walton; and

(i) Hayley Street ("the Employees").

(3) On or around March 2007 the first respondent contravened s.792(1)(b) of the WR Act in respect of the Employees.

(4) On or around March 2007 the first respondent contravened s.792(1)(c) of the WR Act respect of the Employees.

(5) On or around April 2007 the first respondent contravened s.342(1) of the WR Act in respect of the employees referred to at paragraph 143 in Annexure A to these reasons.

(6) On or around March 2007 the second respondent contravened s.400(5) of the WR Act in respect of the Employees.

(7) On or around March 2007 the second respondent contravened s.792(1)(b) of the WR Act in respect of the Employees.

(8) On or around March 2007 the second respondent contravened s.792(1)(c) of the WR Act in respect of the Employees.

IT IS ORDERED

(9) Pursuant to s.407 of the WR Act that the first respondent pay to the Consolidated Revenue Fund of the Commonwealth a penalty of $51,601.25 in respect of the nine contraventions by it of s.400(5);

(10) Pursuant to s.407 of the WR Act that the first respondent pay to the Consolidated Revenue Fund of the Commonwealth a penalty of $2,000.00 in respect of the twenty contraventions by it of s.342(1); and

(11) Pursuant to s.407 of the WR Act that the second respondent pay to the Consolidated Revenue Fund of the Commonwealth a penalty of $6,398.75 in respect of the nine contraventions by her of s.400(5).

(12) The penalties in orders (9), (10) and (11) be paid by any plan agreeable to the applicant and the respondent but in any event in full within 8 months.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

LNG 1 OF 2009

FAIR WORK OMBUDSMAN
Applicant

And

PRIMROSE DEVELOPMENT COMPANY PTY LTD (ACN 062 713 811)

First Respondent

And

JUDITH SIMMONDS
Second Respondent

REASONS FOR JUDGMENT

1. These reasons for decision concern proceedings for certain declarations and penalties as a result of breaches of the *Workplace Relations Act* 1996 ("the WR Act") in 2007.

2. These proceedings were commenced prior to the amendments to that legislation made by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("the Transitional Act") and the commencement of the *Fair Work Act 2009.* However by virtue of the relevant provisions of the Transitional Act, the Fair Work Ombudsman ("the applicant") is able to continue to prosecute these proceedings.[1]

[1] see Item 13, Part 3 of Schedule 18

3. Primrose Development Company Pty Ltd ("the First Respondent") was the business which Judith Simmonds ("the Second Respondent") and her husband ("Mr Simmonds") used to operate their Donut King franchise stores in Tasmania.

4. By reason of the operation of the *Workplace Relations Amendment (Work Choices) Act 2005*, the Tasmanian Retail Trades Award became a Notional Agreement Preserving a State Award ("NAPSA") and, relevantly for present purposes, applied to the employees at the Donut King stores in Hobart and Kingston Tasmania run by the respondents.[2]

5. The applicant commenced proceedings against the respondents on 26 February 2009 for penalties as a result of breaches of the WR Act.

6. The applicant alleged the following employees of the First Respondent were subject to conduct by the respondents in breach of the WR Act:

   a) Sally Holmes;

   b) Hannah Hughes;

   c) Jarad Hughes;

   d) Millicent Derrick;

   e) Sally Dwyer;

   f) Stacey Hickey;

   g) Kate Allen;

   h) Nicole Walton; and

   i) Hayley Street ("the Employees").

7. By its amended application and statement of claim dated 17 April 2009, the applicant alleged that the respondents engaged in conduct in relation to the Employees that contravened s.400(5), s.792(1)(b), s.792(1)(c) and s.342(1) of the WR Act.

[2] the respondents also ran a business at Devonport

8. On 24 April 2009 the respondents filed a response and a defence in which they admitted all of the contraventions of the WR Act alleged by the applicant and consented to the making of certain orders sought by the applicant.[3]

9. By order made on 20 April 2009, the proceeding was listed for a penalty hearing on 19 June 2009.

10. On 15 May 2009 the parties filed a Statement of Agreed Facts ("**SOAF**") which is Annexure A to these reasons for decision.

11. On 22 May 2009 the Applicant filed an outline of submissions, the respondents filed their outline of submissions and an affidavit of the Second Respondent on 9 June 2009 and the applicant filed submissions in reply on 12 June 2009.

12. However, on 17 June 2009 the matter was re-listed to 3 July 2009 to allow the respondents time to file material in relation to the size of the business and the impact of any penalty imposed on them.

13. The matter proceeded to hearing on 3 July 2009 for the purposes of determining an appropriate penalty on the respondents against the background where the First Respondent and the Second Respondent had admitted:

> *"(a) nine contraventions of s 400(5) of the WR Act by applying duress in connection with the offer of an AWA to each of the affected employees;*
>
> *(b) nine contraventions of s 792(1)(b) of the WR Act by threatening to injure each of the affected employees in their employment for the reason that the employee was entitled to the benefit of an industrial instrument, namely, the NAPSA; and*
>
> *(c) nine contraventions of s 792(1)(c) of the WR Act by threatening to alter the position of each of the affected employees to their prejudice for the reason that the employee was entitled to the benefit of an industrial instrument, namely, the NAPSA.[4]"*

[3] by their response filed 24 April 2009 the respondents consented to the making of the orders sought in paragraphs 1, 2, 3, 4, 7, 8, 9 and 11 of the amended application.
[4] see para 11 of applicant's outline of submissions

14. The First Respondent had also admitted twenty breaches of s.342(1) of the WR Act[5] in that, it lodged declarations under s.344(2) without annexing a copy of the relevant AWA.[6]

15. The respondents acknowledged that at the time of the breaches in 2007 five of the Employees were employed at the Hobart store, four of the Employees at the Kingston store and all the Employees were between 15 and 19 years of age and employed on a casual basis.[7]

16. The Court was also told:

> *"14. The parties have agreed that in all the circumstances orders and declarations to the following effect are appropriate:*[8]
>
> *(a) declarations in respect of the nine contraventions of s 400(5) of the WR Act by the first respondent;*
>
> *(b) declarations in respect of the nine contraventions of s 792(1)(b) of the WR Act by the first respondent;*
>
> *(c) declarations in respect of the nine contraventions of s 792(1)(c) of the WR Act by the first respondent;*
>
> *(d) declarations in respect of the twenty contravention of s 342(1) of the WR Act by the first respondent;*
>
> *(e) declarations in respect of the nine contraventions of s 400(5) of the WR Act by the second respondent;*
>
> *(f) declarations in respect of the nine contraventions of s 792(1)(b) of the WR Act by the second respondent;*
>
> *(g) declarations in respect of the nine contraventions of s 792(1)(c) of the WR Act by the second respondent;*
>
> *(h) an order under s 407 of the WR Act that the first respondent pay to the Consolidated Revenue Fund of the Commonwealth a penalty or penalties in respect of the nine contraventions by it of s 400(5);*
>
> *(i) an order under s 407 of the WR Act that the first respondent pay to the Consolidated Revenue Fund of*

[5] in respect of the twenty employees identified in paragraph 143 of the SOAF in relation to whom an AWA had been approved
[6] SOAF, paragraphs 144-14
[7] see applicant's submissions para 10
[8] see "Orders Agreed" at conclusion of SOAF

the Commonwealth a penalty or penalties in respect of the twenty contraventions by it of s 342(1); and

(j) an order under s 407 of the WR Act that the second respondent pay to the Consolidated Revenue Fund of the Commonwealth a penalty or penalties in respect of the nine contraventions by it of s 400(5).

15. The first respondent has made payments in the nature of compensation to the affected employees.[9] *Accordingly, orders for compensation are not required.*

16. The parties have also agreed that penalties will not be sought for the contraventions by the respondents of ss.792(1)(b) and (1)(c) of the WR Act.[10]*"*

17. At the hearing on 3 July 2009 the applicant was represented by Mr J. Snaden of Counsel and the respondents by Mr A. Young of Counsel. The parties agreed (and an order was made by consent) consequential upon the commencement of the Transitional Act that the name of the applicant should be changed to the Fair Work Ombudsman.

18. The applicant relied on:

- the amended application filed 17 April 2009;
- the amended statement of claim filed 17 April 2009;
- the SOAF filed 15 May 2009;
- the outline of submissions filed 22 May 2009; and
- submissions in reply filed 12 June 2009.

19. The respondents relied on:

- defence/response filed 28 April 2009;
- the SOAF filed 15 May 2009;
- affidavit of second respondent made 9 June 2009;
- outline of submissions filed 9 June 2009; and

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[9] SOAF, paragraphs 126 to 142

[10] see paragraphs 39 to 40 in SOAF

- further affidavit of second respondent filed 29 June 2009.

Background

20. The following iteration of the relevant background and the agreed facts regarding the breaches of the WR Act is taken from the SOAF:

> *"14. In or about March 2007, the Second Respondent and* [Mr] *Simmonds held a meeting of staff employed at the Hobart store including Holmes, H Hughes, J Hughes, Derrick and Dwyer (**the Hobart staff meeting**).*
>
> *15. At or around the time of the Hobart staff meeting the Second Respondent and Simmonds provided staff at the Hobart store with copies of AWAs on exactly the same terms.*
>
> *16. In the course of the Hobart staff meeting, the Second Respondent and Simmonds, amongst other things, told the staff attending the meeting that the First Respondent had decided to offer AWAs to staff at the Hobart store.*
>
> *17. In the course of the Hobart staff meeting the Second Respondent and Simmonds told the staff attending the meeting that the AWAs provided for flat hourly rates of pay and no penalty rates, and there was no room for negotiation of the rates of pay to be paid under the AWAs.*
>
> *18. In the course of the Hobart staff meeting the Second Respondent said, in answer to questions about what would happen if staff did not sign the AWAs, words to the effect:*
>
> *(a) staff who did not sign would not get any shifts;*
>
> *(b) she had a stack of résumés "that high" at home; and*
>
> *(c) there were plenty of people who would work under the agreement.*
>
> …
>
> *44. In or about March 2007, the Second Respondent and Simmonds held a meeting of staff employed at the Kingston store including Hickey, Allen, Walton and Street (**the Kingston staff meeting**).*

45. At or around the time of the Kingston staff meeting the Second Respondent and Simmonds provided staff at the Kingston store with copies of AWAs on exactly the same terms.

46. In the course of the Kingston staff meeting, the Second Respondent and Simmonds, amongst other things, told the staff attending the meeting that the First Respondent had decided to offer AWAs to staff at the Kingston store.

47. In the course of the Kingston staff meeting the Second Respondent and Simmonds told the staff attending the meeting that the AWAs provided for flat hourly rates of pay and no penalty rates, and that there was no room for negotiation of the rates of pay to be paid under the AWAs.

48. In the course of the Kingston staff meeting the Second Respondent said, in answer to questions about what would happen if staff did not sign the AWAs, words to the effect:

(a) staff who did not sign would not be guaranteed any shifts;

(b) she got lots of résumés across her desk; and

(c) there were plenty of people who would work under the agreement.

…"

21. In summary the admitted conduct in this case saw the Second Respondent and Simmonds hold meetings with employees (including the Employees) of the First Respondent in early 2007.[11] During the meetings those attending were told they would be offered AWAs, these were provided during the meetings, were in exactly the same terms and provided for flat hourly rates of pay and no penalty rates.[12]

22. Those attending were told there was no room for negotiation.[13] The Second Respondent said, in answer to questions at those meetings about what would happen if the AWAs were not signed, that they either would not be guaranteed or would not get any shifts, that she had a stack

[11] see SOAF paras 14,16, 44 and 46
[12] see SOAF paras 15 and 45
[13] see SOAF para 12

of resumes 'that high' at home and lots of resumes came across her desk and there were plenty of people who would work under the AWA.[14]

23. It is agreed that as a result of the conduct referred to in paragraph 15 – 18 of the SOAF that in relation to those of the Employees at the Hobart store:

a) Holmes signed an AWA on 6 March 2007;

b) Dwyer signed an AWA on 16 March 2007;

c) Derrick signed an AWA on 19 March 2007;

d) H. Hughes signed an AWA on 31 March 2007; and

e) J Hughes signed an AWA on 31 March 2007.

24. It is also agreed that as a result of the conduct referred to in paragraph 45 – 48 of the SOAF that in relation to those of the Employees at the Kingston store:

a) Hickey signed an AWA on 20 March 2007;

b) Walton signed an AWA on 20 March 2007;

c) Allen signed an AWA on 20 March 2007; and

d) Street did not sign an AWA but her wage rate was changed to the rate payable under the AWA in late April/May 2007.

25. As a result of the conduct detailed above it is agreed:

a) that in respect of those of the Employees who worked at the Hobart store the First and Second Respondent applied duress to and threatened to injure or alter their position to their prejudice for the reason they were entitled to the benefit of an industrial instrument; and

b) that in respect of those of the Employees who worked at the Kingston store the First and Second Respondent applied duress to and threatened to injure or alter their position to their prejudice

[14] see SOAF para 18 and 48 and applicant's submissions paras 21(f) &(g)

for the reason they were entitled to the benefit of an industrial instrument.

26. It is also agreed that in or about April 2007 the First Respondent, when lodging AWAs for the 20 employees referred to at paragraph 143 of the SOAF, had failed to annex a copy of the AWA to the relevant declaration as required by s.344(1)(b) of the WR Act and in breach of s.342.

The legal framework

27. As is clear from the agreed background the breaches, which are set out in the SOAF at Annexure A to these reasons, in this case involve duress in relation to the making of AWAs, failure to comply with the statutory requirements for lodging such agreements and conduct contrary to the freedom of association provisions of the WR Act.

28. Section 400(5) of the WR Act as it then was prohibits the application of duress to an employee "*in connection with*" an AWA. The concept of duress involves the illegitimate application of pressure: *Schanka v Employment National (Administration) Pty Ltd* 92 IR 464 at [43]; *Canturi v Sita Coaches Pty Ltd* (2002) 116 FCR 276 at [38]-[43].

29. What is illegitimate is a question of fact to be decided in the circumstances of the particular case: *Canturi v Sita Coaches Pty Ltd* (supra) at 43. Illegitimate pressure including unlawful threats or pressure amount to unconscionable conduct. It can also include unlawful conduct in relevant circumstances: *Maritime Union of Australia v Geraldton Port Authorities* (1999) 93 FCR 34 at [367]. The requirement to enter into an AWA does not need to be an issue for duress to arise: *Bishop v Ropolo Services Pty Ltd* (2006) 153 FCR 357 at [21]. Neither is it an essential element for a contravention of s.400(5), for the will of the employee to be actually overborne: *Granada Tavern v Smith* [2008] FCA 646 at 75.

30. Section 342 of the WR Act relevantly requires, in relation to an AWA which has been approved by an employee and employer, that the employer lodge the AWA in accordance with s.344. Section 344(1)(b) of the WR Act requires that a copy of the AWA be annexed to the declaration prescribed by s.344(2).

31. Section 792(1) of the WR Act prohibits *inter alia* injuring or altering the position of an employee to their prejudice for reasons including that the employee is entitled to the benefit of an industrial instrument.

32. Section 792(1) provides:

> *"(1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:*
>
> *(a) dismiss an employee;*
>
> *(b) injure an employee in his or her employment;*
>
> *(c) alter the position of an employee to the employee's prejudice;*
>
> *(d) refuse to employ another person as an employee;*
>
> *(e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person as an employee."*

33. Section 793(1)(i) provides:

> *"Conduct referred to I n subsection 792 (1) or (5) is for a* ***prohibited reason*** *if it is carried out because the employee, independent contractor or other person concerned:*
>
> …
>
> *(i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard*
>
> …"

34. Section 809 provides:

> *"Proof not required of the reason for, or the intention of, conduct*
>
> *(1) If:*
>
> *(a) in an application under section 807 relating to a person's conduct, it is alleged that the conduct was, or is being carried out for a particular reason or with a particular intent; and*

> *(b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;*
>
> *it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise…."*

35. Section 407 of the WR Act provides that the maximum penalty for a breach of s.400(5) is 60 penalty units in the case of an individual and 300 penalty units in the case of a body corporate.

36. The penalty for a breach of s.342 of the WR Act by the First Respondent is $16,500.[15]

37. By virtue of s.807 of the WR Act the maximum penalty for a breach of s.792 is also 60 penalty units for an individual and 300 penalty units for a body corporate.

38. Section 4(1) of the WR Act defines '*penalty unit*' as having the meaning given by s.4AA of the *Crimes Act 1914* (Cth) with the penalty unit being $110.

39. Finally, as noted earlier the parties agreed there were nine breaches of s.400(5) by both the First and Second Respondents and 20 breaches of s.342 by the First Respondent. By virtue of that agreement (and subject to an argument advanced on behalf of the respondents to which I will return) the maximum penalty that could be imposed in relation to the breaches of the WR Act is $627,000 in relation to the First Respondent and $59,400 in relation to the Second Respondent. The total maximum penalty therefore could be $686,400.

Approach to penalty proceedings

40. The approach to be followed in penalty proceedings has been well established.[16] The authorities set out that the considerations so far as they are relevant for the assessment of penalty include:

[15] see s.407(1) and s407(2)(g)

a) the nature and extent of the conduct which led to the contraventions;

b) the circumstances of the conduct (including deliberate defiance or disregard of the WR Act);

c) relevant record of civil penalty contraventions;

d) whether the contraventions are distinct or arise from a single course of conduct;

e) the consequences of the contravening conduct;

f) deterrence, both general and specific;

g) the objects of the WR Act;

h) the size and financial resources of the contravener;

i) co-operation with regulator authorities;

j) the contravener's contrition;

k) the size of the prescribed penalty, and any recent increases to that prescription; and

l) the totality principle.

41. In *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (2007) 166 IR 14 said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations. There is no suggestion in the present case that the learned magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties."*

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[16] see *inter alia*: *Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7, *Kelly v Fitzpatrick* (2007) 166 IR 14 and *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC8

42. In *Rojas v Esselte Australia Pty Ltd (No 2)* [2008] FCA 1585 Moore J said at [65]:

> *"65. Although "check lists" of the above kind are a useful starting point in determining whether a penalty ought to be imposed, and If so the level of such penalty, at the end of the day the task of the Court is to fix a penalty that pays appropriate regard to the contraventions that have occurred:* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith *[2008] FCAFC 8; 2008 165 FCR 560 at [91]. Moreover, as the Full Court noted in* Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union *[2008] FCAFC 170 at [60], while general guidance as to the appropriate penalty may be obtained through an analysis of comparable cases, it remains necessary for the Court to give careful consideration to the circumstances of the case before it (see also* Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*…at [12] per Gray J."*

43. It is not disputed that the totality principal ought to be applied to the penalties in this case. That principle does not necessarily result in a reduction of the penalty but a final look to see that the sentence to be imposed is not excessive.

44. In *Kelly v Fitzpatrick* (2007) 166 IR 14 it was said:

> *"14. Different views have been expressed as to the manner in which the principle ought properly to be applied … the orthodox position … which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches; (see* Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd *(1997) 145 ALR 36 at 53. See also* Ponzio v B & P Caelli Constructions Pty Ltd *(2007) FCAFC 65 at (145) per Jessop J. This approach was recently described in the criminal context from which the totality principle is derived, as 'the orthodox but not necessarily immutable practice' adopted by the sentencing courts: see* Johnson v R *[2004] HCA 15; [2004] 205 ALR 346 at 356 per Gummow, Callinan and Heydon JJ."*

45. In *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [78]- [79] Graham J with whom Gray J agreed on applying an '*instinctive synthesis'* approach said:

> *"78. Accepting as correct the numerous findings made by the learned Magistrate in respect of the considerations which she took into account as relevant to the determination of the amounts of the penalties to be imposed, I consider that the question whether the aggregate of $88,000 was just and appropriate and should be answered in the negative. Applying an 'instinctive synthesis' approach, as explained by McHugh J in* Markarin v The Queen, *I would incline to the view that the aggregate figure was an inappropriate response to the conduct which led to the 22 breaches of the relevant Awards."*

46. Given the approach to the penalties to be imposed in proceedings of this sort set out above the Court now turns to the contraventions involved and the submissions made by the parties on the relevant considerations as to penalty in this matter.

Submissions

47. The applicant's submissions filed 22 May 2009 noted that whilst the authorities make clear the summary of considerations referred to at paragraph 40 above is a convenient checklist it does not prescribe or restrict the matters that may be taken into account.[17]

48. Given this the parties agreed that the particular considerations relevant in deciding what penalty should be imposed in this matter are as follows:

- the circumstances, nature and extent of the conduct;
- the seriousness and consequences of the breaches;
- deterrence;
- corrective action and co-operation;
- the circumstances of the respondents;
- the size and financial resources of the respondents; and
- the totality principle.

[17] see para 20 of applicant's submissions

49. Turning then to consider those factors and the parties submissions which addressed the above considerations at least, if not the specific headings referred to in *Kelly v Fitzpatrick* (2007) 166 IR 14.

Circumstances, nature and extent of conduct

50. The applicant made submissions addressing the conduct in contravention of ss.400(5), 792(1)(b) & 792 (1)(c) and 342(1) of the WR Act.[18] In relation to the breaches of s.400(5) the applicant submitted:

> *"23. The manner in which the AWAs were offered to the affected employees and the contemporaneous comments made by the proprietors of the business involved the application of duress to those employees…. The affected employees were told that there was no scope to negotiate the terms of the AWAs. By the second respondent's references to the fact that there were plenty of other people willing to work under the AWA and the existence of numerous résumés, the affected employees were given an invidious choice; sign the AWA or lose their employment. Unconscionable pressure was also applied by the second respondent's statements which made it clear that the continued provision of shifts was contingent on the affected employees signing the AWAs. Given that all of the affected employees were employed on a casual basis, this was equivalent to a direct threat to their continued employment.*
>
> *24. In the circumstances, including the young age of all of the affected employees (most of whom were minors), it is unsurprising that all of them save one signed the AWA; the duress applied by the respondents induced that outcome."*

51. In relation to the breaches of s.792 the applicant submitted:

> *"26. The respondents' statements to the affected employees that staff who did not sign the AWAs would not get, or be guaranteed, any shifts, was accordingly a threat to injure those employees in their employment and a threat to alter their position to their prejudice within the meaning of ss792(1)(b) and (1)(c) of the WR Act. The respondents' threat to the security of the affected employees employment by referring to the existence of numerous resumes and other*

[18] see para 22 to 29 of applicant's submissions

people willing to work under the agreement was likewise a threat of the requisite type proscribed by ss 792(1)(b) and (1)(c).[19] *This analysis is consistent with authority that the application of duress to an employee constitutes conduct that injures, or threatens to injure, an employee in their employment, or which alters, or threatens to alter, the position of an employee to their prejudice.*[20]

52. Noting the reverse onus of proof that would have applied in any contested proceedings and the respondents' admissions the applicant submitted the conduct was undertaken for the prohibited reason alleged.[21]

53. Finally, the applicant dealt with s.342 and the 20 breaches already referred to at paragraph 26 above.

Seriousness and consequences of the breaches

54. In relation to this particular consideration the applicant's submissions canvassed the importance of compliance with the WR Act and that the respondent's conduct in this case was "*inherently serious*". The applicant's submissions noted that in the context of the agreement making process under the WR Act the penalty regime played an important role in ensuring its integrity.[22]

55. In relation to the breaches of s.792 the applicant's submissions were:

> *"34. In the specific facts of this case, two matters in particular demonstrate the seriousness of the respondents' conduct:*
>
> *(a) first, as outlined in paragraph 23 above, the duress applied by the respondents was effected by threats to the employment security of the affected employees; and*
>
> *(b) secondly and relatedly, as young casual employees (the majority of whom were minors), the affected employees were especially vulnerable to the threats made to their employment security. Their vulnerability and the obvious disparity in their relative bargaining power*

[19] conduct which diminishes the security of employment of employees is conduct within s. 792(1)(c) of the WR Act*: CPSU v Telstra Corporation Limited* (2000) 104 IR 195 at 201
[20] *Canturi v Sita Coaches Pty Ltd* [2002] FCA 349
[21] see para 27 to 28 of applicants submissions
[22] see para 30 to 32

> *with the respondents reinforces the gravity of the "*illegitimate pressure*" placed on them by the respondents.*[23]*"*

56. The applicant's submissions addressed the consequences of the conduct for the Employees noting *inter alia* they were "*given the impression the continuation of their employment was dependent on their signing the AWA*" and that a number were paid less than under the NAPSA.[24]

57. However, the applicant accepted that implicit in the respondents' admissions was an acknowledgement that "*their attempt to introduce AWAs was not handled appropriately*", this was "*a consequence of a lack of specific knowledge*" and that the respondents have since sought professional advice. The applicant submitted:

> *"36. In the circumstances, the applicant submits that the contraventions of s 400(5) and ss 792(1)(b) and (1)(c) of the WR Act by the respondents are in the lower to medium range of seriousness, and therefore should attract a penalty in the low to middle range (being $10,000 to $15,000 for the first respondent, and $1,500 to $3,000 for the second respondent).*
>
> *37. In relation to the first respondent's contravention of s 342(1) of the WR Act, the applicant submits that in the circumstances disclosed in the SOAF, that contravention should attract a nominal penalty."*

58. Finally, the applicant reiterated the joint submission made in the SOAF that the breaches of s.792 arose out of the same course of conduct as the breaches of s.400(5) and there ought be no additional penalties imposed to those imposed for that purpose as a result.[25]

Deterrence

59. In relation to this particular consideration the applicant submitted:

> *"42. The applicant submits that, given the early cooperation and admissions by the respondents, together with the action they have taken to mitigate and remedy the effects of the*

[23] *Smith v Granada Tavern (No 2)* [2007] FMCA 904 at [293]
[24] see para 38 of applicant's submissions
[25] see para 40 of applicant's submissions

contraventions of the WR Act, the need for specific deterrence is not a significant consideration in this matter.

43. *On the need for and approach to general deterrence, the applicant notes the following statement by Lander J in* Ponzio v B & P Caelli Constructions Pty Ltd*:*[26]

> If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat.

44. *In* Vonarx v Squaw Valley Pty Ltd[27] *Cameron FM reviewed the relevant authorities on deterrence and stated as follows:*

> ...However, general deterrence does need to be considered in order that the law's disapproval of the conduct in question should be marked and a penalty serve as a warning to others not to engage in similar conduct: *CPSU, Community and Public Sector Union v Telstra Corporation Limited* [2001] FCA 1364 at [9]. For a penalty to have the desired effect it must be imposed at a meaningful level: *Financial (sic) Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 at [41]. A price should be put on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act: *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 per French J at [52,152].

45. *Further, in having regard to general deterrence, the Court may seek to send out a message, not only to the respondents, but also to the industry in which the respondents operate generally.*[28] *This is of relevance in the present case. Employment in franchises in the retail sector such as the Donut King franchises owned and operated by the respondents is dominated by young workers. Employers operating in similar circumstances to those of the respondents must too be made aware that conduct of the type engaged in by the respondents in this matter is*

[26] (2007) 158 FCR 543, at [93]
[27] [2008] FMCA 212 at [92]
[28] *Flattery v Zefferelli's Pizza Restaurant* [2007] FMCA 9 at [63]-[66]

> *unacceptable in the community, particularly when that conduct involves, in effect, the taking advantage of vulnerable junior employees. It is important that other employers who employ employees in circumstances in which there is a substantial inequality in bargaining power are deterred from abusing their superior bargaining position in the conduct of employment relationships, including the making of agreements under the WR Act."*

60. I have considered the submissions made by the respondents on this issue but I accept as the applicant submitted there is a need for general deterrence, to mark the disapproval of the conduct in question and to act as a warning to others not to engage in similar conduct. I bear in mind the remarks of Tracey J in *Kelly v Fitzpatrick* at [28] that:

> *"No less than large corporation employers, small buinesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction* "must be imposed at a meaningful level": *see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13]."*

Corrective action and co-operation

61. In relation to this particular consideration the applicant noted the payments made by the respondents to those of the Employees who suffered loss and damage as a result of the breaches.[29]

62. The applicant also noted the co-operation of the respondents during its investigation and since the institution of these proceedings.

63. In her further affidavit sworn 29 June 2009 the second respondent deposed:

> *"50. I deeply regret that my conduct as a director of the Company may have been a cause of any loss or damage suffered by any of the Company's employees. In addition, I am most ashamed that by my conduct I have contravened provisions of the* Workplace Relations Act.

[29] see para 127 to 142 of SOAF

> *51. Immediately upon the applicant informing the Company and me that the Relevant Conduct may have constituted breaches of the* Workplace Relations Act, *my husband and I caused the Company to engage and retain a firm of professional human resouces and industrial relations advisors and consultants(which firm was recommened to us by staff of the applicant's office).*
>
> *52. In short, the Company engaged and retained Searson Buck to advise it concerning the Company's obligations pursuant to the* Workplace Relations Act *and to assist it to ensure that the Company and its directors do not commit any future breach of the Act. The Company's engagement and retainer of Searson Buck should ensure that there will be no repetition of the breaches which have led to this proceedings.*
>
> *53. As the applicant has stated in paragraph 57 of his Outline of Submissions, the Company and I have co-operated swftly and fully with the applicant in:*
>
> *(a) the conduct of the investigation carried out by the Office of the Workplace Ombudsman concerning, among other things, the Relevant Conduct;*
>
> *(b) admitting all of the contraventions of the* Workplace Relations Act *alleged by the applicant; and*
>
> *(c) negotiating the terms of the Statement of Agreed Facts."*

64. I accept those submissions including those made by the applicant and am satisfied that they weigh in favour of the respondents in determining any penalty.

Circumstances of the respondents

65. In relation to this particular consideration the applicant's submissions noted there were no known prior convictions and the First Respondent was a small proprietary company with three stores in Tasmania.

66. The applicant noted the Second Respondent and Simmonds were both involved in the day to day management of the First Respondent and the conduct giving rise to the breaches.

Other matters

67. The applicant's submissions then addressed the issue of discounted penalty:

> "*56. In* Mornington Inn v Jordan,[30] *Stone and Buchanan JJ made the following observations of principle in relation to the circumstances in which the penalty to be imposed on a respondent should be discounted by reason of an admission of liability:*
>
> > 'It is important to note that it is not a sufficient basis for a discount that the plea has saved the cost of a contested hearing — that would discriminate against a person who exercised a right to contest the allegations. A discount may be justified, however, if the plea is properly to be seen as willingness to facilitate the course of justice. Remorse and an acceptance of responsibility also merit consideration where they are shown.
> >
> > A conventional consideration in assessing a discount in a criminal case for a plea of guilty is the stage in the proceedings at which the plea is entered. Normally, the maximum discount for this factor, sometimes thought to be 25%, is reserved for a plea made at the first reasonable opportunity although, as was indicated in Cameron (at [23]–[24]) there is no obligation to make an early plea to a charge which wrongly particularises the substance to which the charge relates.
> >
> > As Branson J has pointed out (see *Alfred v Walter Construction Group Ltd* [2005] FCA 497) the rationale for providing a discount for an early plea of guilty in a criminal case does not apply neatly to a case, such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible

[30] (2008) 168 FCR 383

expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice.'[31]

57. In the present case, the respondents filed a Defence in which they admitted all of the contraventions of the WR Act alleged by the applicant. The applicant accepts that those admissions were provided at an early stage in the proceeding. Further, the applicant accepts that the respondents have indicated a willingness to facilitate the course of justice by cooperating with the investigation conducted by the Office of the Workplace Ombudsman and by negotiating the terms of the SOAF. This assistance and cooperation has significantly reduced the time required to prepare for hearing, the length of that hearing and has obviated the need for young workers to give evidence in what may have been stressful circumstances.

58. In the circumstances, the applicant submits that the appropriate discount for the admissions made by the respondents is 20-25% of the total penalty awarded by the Court."

68. Also relevant to the determination of penalty is that the parties agreed the breaches of s.792 arose out of the same course of conduct as s.400(5) and no additional penalty would be sought for the former.[32]

69. In her further affidavit sworn 29 June 2009 the second respondent deposed:

"53. As the applicant has stated in paragraph 57 of his Outline of Submissions, the Company and I have co-operated swftly and fully with the applicant in:

(a) the conduct of the investigation carried out by the Office of the Workplace Ombudsman concerning, among other things, the Relevant Conduct;

(b) admitting all of the contraventions of the Workplace Relations Act *alleged by the applicant; and*

(c) negotiating the terms of the Statement of Agreed Facts."

[31] (2008) 168 FCR 383 at [74]-[76]
[32] see para 40 of applicant's submissions

70. As the statutory official charged with enforcing entitlements due under and compliance with the WR Act the Court will take the applicant's submissions into account both respect to the discount contended for and whether the breaches under s.792 arose out of the same course of conduct as those under s.400(5).

Size and financial resources of the contravener

71. As noted earlier the respondents sought to file further affidavit material before the penalty hearing in relation to this particular factor.

72. In the second respondent's further affidavit sworn 29 June 2009 she deposed:

> "*20. The Company's most recent financial statements are its financial statements for the year ended 30 June 2008.* ***Annexure "B"*** *to the this my affidavit is a true copy of those financial statements (the* ***Financial Statements****).*
>
> *21. The Financial Statements give a true and fair view of the company's financial position as at:*
>
> *(a) 30 June 2008; and, by comparison*
>
> *(b) 30 June 2007,*
>
> *save that they contain the error referred to in paragraph 22 below*
>
> *22. The error referred to in paragraph 21 above is that the Financial Statements include an interest in land, referred to as the* 'Quarry Site'*, as an asset of the Company. However, that interest is, and has always been, held by the Company as trustee of the Simmonds superannuation fund. The Company has no beneficial interest in the* 'Quarry Site'.
>
> *23. As at 30 June 2007, the Company had a net asset deficiency. In other words, its liabilities exceeded the value of its assets by $151,533.55.*
>
> *24. In the year ended 30 June 2007, the Company made a net loss of $1,697 before tax.*
>
> *25. As at 30 June 2008, the Company had a net asset deficiency. In other words, its liabilities exceeded the value of its assets by $137,527.55.*

26. In the year ended 30 June 2008, the Company made a net profit of $14,004 before tax.

27. Although its financial statements for the year ended 30 June 2009 have not yet been prepared, based upon my knowledge of the contents of the books and records of the Company, I estimate that:

(a) as at 30 June 2009, the Company will have a net asset deficiency (its liabilities will exceed the value of its assets by a sum in the order of $55,000); and

(b) in the year ended 30 June 2009, the Company will have made a net profit of approximately $80,000 before tax.

28. The Company's working capital comprises $260,000 borrowed from GE Finance Australia Ltd. My husband and I have personal obligations to GE Finance Australia Ltd in respect of that loan.

29. In recent months, my husband and I have endeavoured, without success, to borrow more money for use by the Company. Also in recent months, my husband and I have endeavoured, without success, to re-finance the Company's loan facility.

…

47. The Company's Financial Statements are ***Annexure 'B'****. At present, the Company has about ten (10) casual employees. At the time of the Relevant Conduct, the Company had no external advisors other than an accountant. Neither my husband or I had then, or have now, any expertise in industrial law."*

73. In *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337 Lucev FM was satisfied after an extensive review of the relevant cases that the size and financial resources of a contravener are factors to be considered and the impact of those "…*upon the setting of penalty is in each case a matter for consideration of the particular circumstances of the size and financial resources of the contravener, plus the other factors which are relevant*"[33]

[33] see para 76 in *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337

74. In that case His Honour allowed a discount of 20-25% on the penalty where there was no dispute the business was a very small one but there was effectively no evidence as to the financial resources of the respondent.

75. In this case the respondents started business in Tasmania in 2001 and by 2007 they had stores in Devonport, Hobart and Kingston.

76. The second respondent's evidence was the business had a history of net asset deficiency and that if any penalty, other than a nominal penalty was imposed the first respondent would be forced to:

> *"…*
>
> *(a) terminate the employment of at least the majority of the Company's ten (10) casual employees;*
>
> *(b) endeavour to operate the business of the Company ourselves with as few employees as possible; and*
>
> *(c) endeavour to sell the Company's interest in its last remaining 'Donut King' store, namely the store in the Cat & Fiddle Arcade at Hobart."*

77. The decision of *Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd* (1994) 127 ALR 673 considered the imposition of a penalty for breach of the Act (albeit a previous iteration of the WR Act) and said at 688.3:

> *"In fixing the amount of the daily penalties, I have not overlooked the evidence given by Mr McNamee that suggests both he and Vista are now in a parlous financial position. Mr McNamee said a meeting of his creditors had been called to consider a deed of arrangement, under Part X of the* Bankruptcy Act 1966. *His counsel, Mr Newlinds, tendered the Statement of Affairs prepared for that meeting. It shows a substantial excess of liabilities over assets. Most of the liabilities are for moneys said to be due under guarantees given by Mr McNamee. After the hearing, while judgment was reserved, Mr Newlinds informed me by letter that Mr McNamee had presented a debtor's petition in bankruptcy. Presumably the creditors' meeting rejected his proposal and he is now bankrupt.*
>
> *While this evidence suggests that both Vista and Mr McNamee may have difficulty in paying penalties, I do not think I should*

allow it to deflect me from imposing whatever penalties are otherwise appropriate..."

78. Therefore, and consistent with the authorities, if the circumstances require a substantial penalty to be imposed the financial difficulty this may occasion should not deter the imposition of a penalty.

79. In the circumstances and taking into account the second respondent's evidence I will impose a further discount of 30% to take account of the size of and financial circumstances of the respondents.

Assessment of penalty to be applied

80. In light of the above considerations the Court will have to determine the appropriate penalty. So far as the breaches are concerned the following factors in my view are of particular significance in this matter:

a) the Employees were all young casual employees;

b) the conduct engaged in by the respondents in relation to the AWAs offended "…*the scheme of the legislation which, putting the matter broadly, is designed to promote the free and fair bargaining process which is supposed to give rise to AWAs*";[34]

c) the conduct of the Second Respondent was that of senior management, but this was a very small operation;

d) the respondents have expressed abject contrition before the Court and there has been full cooperation with the investigation, the provision of the SOAF and the agreement reached with applicant which has saved the cost and expense of a trial;[35]

e) there is no previous similar conduct alleged against the respondents;[36] and

f) the size of the maximum penalty may impact on the business run by the respondents.

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[34] see *Byrne v KNL Group Pty Ltd & Anor* [2008] FMCA 1440 at 16
[35] see para 50 second respondent's affidavit sworn 29 June 2009
[36] see para 45 second respondent's affidavit sworn 29 June 2009

81. In relation to the respondents submissions filed 9 June 2009 and their arguments at paragraphs [5] to [12] in *Glenn Jordan v Mornington Inn Proprietary Limited* [2007] FCA 1384 at [91] it was said:

> *"91…The statutory provisions are not directed to a continuing state of affairs, but rather conduct which answers a particular description. If there are episodes of conduct distinct in time or place, albeit related and engaged in with the same purpose, there will be separate contraventions. To take an example discussed in argument, if an employer on each morning of a week threatened to assault an employee if he did not sign an AWA, there would be a contravention on each day. The evidence in relation to Ms Thompson is in essence no different: cf* Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union *[2005] FCA 1802 at [12] and [16]. However, before penalties are finally fixed in respect of all contraventions, and not just those concerning Ms Thompson, I must look at the totality of all the unlawful conduct:* Mill v The Queen *[1988] HCA 70; (1988) 166 CLR 59 at 63,* Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd *(No 2) (2005) 215 ALR 281 at [14].*
>
> *92. Counsel agreed that the appropriate course would be to make declarations in respect of all contraventions, but to impose penalties only in respect of the duress (s 400(5)) contraventions, those being the more serious."*

82. The "*appropriate course*" referred to in the decision at the first instance appears to have been reflected in the agreed position of the parties in this case in so far as it was agreed additional penalties would not be sought for the contraventions of ss.792(1)(b) and 792(1)(c) and their submissions were directed at the determination of the penalties to be imposed on both the First and Second Respondents for the breaches of s.400(5) and the First Respondent only for the 20 breaches of s.342(1) of the WR Act.

83. However, the respondent's written submissions also raised the issue as to whether the 9 breaches of s.400(5) that had been admitted ought be treated differently. Those submissions were:

> *"10. In addition to the joint submissions made by the parties as set out at [39] and [40] of the Applicant's Outline, the court must take into account, when assessing the appropriate*

penalty in respect of each contravention, the fact that five of the s 400(5) contraventions arise from the uttering of the Second Respondent of three sentences on a single occasion and the other four contraventions arise from her uttering three similar sentences on a second occasion. The nine breaches arose from a single course of conduct comprising in total, two occasions only. The majority in Mornington Inn *at [44] said:*

'The principle invoked by the appellant may also be seen, in a different context, in *Pearce v R* (1998) 194 CLR 610 ('Pearce') where the majority judgment said at [40]:

'To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.'

11. Or, as Finkelstein J observed in Carr v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union *[2005] FCA 1802 at [12]:*

The cases say that if "a number of acts of a similar nature committed by one or more defendants [are] connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise" they should be regarded as one activity or one offence: *Director of Public Prosecutions v Merriman* [1973] AC 584, 607 per Lord Diplock. In substance it is necessary to apply some common sense to the facts.

10. The majority in Mornington Inn *went on to describe how the above principle is different to the application of the totality*

principle which must be separately considered and is discussed below.[37]

11. Even the most cursory of comparisons demonstrate that this is a very different case from the case of Mornington Inn, *where the majority of the Full Federal Court held that although it was open to the sentencing judge to apply the common features principle in mitigation of penalty he had not erred in the sense of* R v House *by deciding not to apply it in the circumstances before him.*

12. In this case the principle applies in a number of ways:

(i) Five breaches arise from exactly the same conduct as each other;

(ii) The other four breaches arise from exactly the same conduct as each other;

(iii) The total of nine breaches arise from the same conduct engaged in on two occasions, shortly separated in time;

(iv) The breaches of the First Respondent are based in there entirety on the conduct of the Second Respondent alone, which conduct comprises the breaches of the Second Respondent."

84. The applicant's submissions in reply joined issue with the respondents submissions on this matter and said:

"6. The respondents' submissions on penalty are principally based on the proposition that the admitted breaches arose from a single course of conduct comprised of two occasions. As outlined below, this argument is used to effectively displace and side-step the established principles for the determination of penalties as set out in paragraphs 18-20 of the applicant's submissions (which are accepted by the respondents at the outset of their submissions: at [4]).

7. There are two steps to the respondents' argument:

(a) The nine breaches of s 400(5) are distilled to a "single course of conduct comprising in total, two occasions only*".*[38]

[37] *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[49], [58]-[59], [64], [67]

(b) *The conversion of the nine breaches into two* "occasions" *provides the foundation for the respondents' ultimate submission that a penalty of between 15%-25% of the maximum penalty be imposed* "for each of the two occasions when the offending conduct occurred".

This analysis should be rejected for the reasons outlined below.

8. *As noted in the applicant's principal submissions,*[39] *whether breaches of the WR Act were properly distinct or arose out of the one course of conduct is a consideration which the Court may take into account in determining the quantum of any penalty which may be imposed. This is so even where, in the context of s 400(5) of the WR Act, the breaches relate to conduct in respect of different employees.*[40]

9. *The Court is* ***not obliged*** *however to treat multiple contraventions of s 400(5) as involving a single course of conduct:* Mornington Inn.[41] *The adoption or otherwise of that approach is a matter for the exercise of judicial discretion.*[42] *If there is no requirement for the Court to treat multiple contraventions of s.400(5) as involving a single course of conduct in circumstances where those contraventions relate to the same employee (as was the case in* Mornington Inn*), there must equally be no obligation to adopt that approach when the contraventions relate to conduct in respect of different employees.*

10. *Adopting this approach, in the circumstances of this matter and in particular the matters agreed between the parties as recorded in the SOAF, the Court should reject the respondents' submission to treat the contraventions of s.400(5) as a single course of conduct comprising two occasions only.*

(a) *The respondents have admitted in the SOAF that each of them contravened s.400(5) on nine separate occasions.*[43] *They have further agreed to the making of orders that each of them pay penalties in respect of*

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38 paragraph 10.
39 see paragraphs 19(e), 39 and 40
40 see for example *Schanka v Employment National (No. 2)* (2001) 114 FCR 379
41 at [58]
42 *Mornington Inn* at [59]
43 for the first respondent: para's 72, 75, 78, 81, 84, 87, 90, 93 and 96. For the second respondent: para's 99, 102, 105, 108, 111, 114, 117, 120 and 123

each of these contraventions.[44] *In this way, they have accepted that the second respondent's conduct is to be regarded as nine separate contraventions of s 400(5) by both her and the first respondent, rather than as a course of conduct representing a single contravention. In* Mornington Inn*, Stone and Buchanan JJ regarded such an agreement by a respondent as a matter of* "real significance" *in finding that there was no appellable error in the primary judge's decision not to treat six breaches of s 400(5) in relation to a single employee as a course of conduct.*

(b) *Just as it is not open to a party to a statement of agreed facts to diminish the clear effect of an agreed fact by the making of assertions from the Bar table,*[45] *it is likewise not open for the respondents to advance submissions contrary to, or inconsistent with, the matters agreed in the SOAF.*

(c) *Further, in the context of the matters agreed by the parties, to treat the nine contraventions of s 400(5) by both respondents as a single course of conduct based on two occasions, would be to afford to the respondents a* "double-benefit" *in the consideration of that matter as a mitigating circumstance. This is because the respondents already have the benefit of that consideration in the following joint submission set out in the SOAF:*[46]

> *The parties agree that the breaches of s 792(1) of the WR Act arose out of the same course of conduct as the breaches of s 400(5) of the WR Act. It is their common position that whilst the matters constituting breaches of section 792(1) of the WR Act can be taken into account in assessing the nature of the breaches of section 400(5) of the WR Act, no penalty, additional to that imposed in respect of the breaches of section 400(5), should be imposed in respect of the breaches of section 792(1) of the WR Act.*

(d) *This submission reflects the principle in Pearce referred to by the respondents, namely, that it is wrong to punish an offender twice for the commission of*

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44 paragraphs 3 and 4 of "Orders agreed" on p 14-15 of SOAF
45 *Mornington Inn* at [84] (Stone and Buchanan JJ)
46 para 1 on p. 15

elements of offences that are common. In Mornington Inn*, a case which involved the same contraventions of the WR Act as are relevantly in issue in this matter, Gyles J stated:*[47]

> *The Pearce principle was accommodated here as penalties were imposed for only the most serious of the two offences arising out of the same facts where both were applicable.*

(e) As outlined above, the Pearce principle has likewise been recognised and applied by the parties in the present matter via the joint submission contained in the SOAF. In that situation, the further application of the principle by treating the nine contraventions of s 400(5) as a single course of conduct comprised of two occasions, would cause the judicial discretion to be exercised by the Court to miscarry as that consideration would be considered twice by the Court and thereby be attributed with undue significance in the Court's assessment of penalty.

(f) The Court should also not overlook the fact that the respondents' conduct, while occurring in two meetings attended by the affected employees, was conduct which bore upon each of those employees individually in that it concerned the making of individual instruments provided for by the WR Act and necessarily affected the capacity of each individual to negotiate those instruments.

11. However, even if the Court determines to treat the respondents' contraventions of s 400(5) as involving a single course of conduct comprised of two occasions, this does not result, as suggested by the respondents, in the individual contraventions being disregarded or subsumed by that course of conduct. The individual contraventions established by the terms of s 400(5) remain unaffected.

12. As outlined in Schanka v Employment National (No. 2)*,*[48] *the correct approach in the event that the Court determines to consider the conduct as involving a single course of conduct as a mitigating factor, is to assess the penalty for each contravention having regard to this and other relevant*

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47 see at [5]

48 (2001) 114 FCR 379 at [75]-[76]

> *factors, subject to the final checking of the total penalty to be imposed by reference to the totality principle. The submission advanced by the respondents is inconsistent with this approach and the authorities which clearly establish that the task for the Court is to firstly determine an appropriate penalty for each contravention as if it were a separate offence and to then check the aggregate of the penalties by reference to the totality principle."*[49]

85. As the applicant correctly noted in written submissions in reply in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 the majority of the Full Court was considering the reasons for the judge in the decision in the first instance treating the contraventions involving the different employees concerned in different ways. At [58] the majority noted it was of real significance for the purposes of the disposition of the appeal that the appellant in that case had explicitly accepted there were 6 separate contraventions rather than as a course of conduct representing a single contravention.

86. In submissions before the Court, Counsel for both parties took the Court to various authorities and focused in particular on the following passage from *Pearce & The Queen* (1998) 194 CLR 610:

> *"To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accident of legislative history, rather than according to their just deserts."*

87. Counsel for the respondents maintained the argument advanced in written submissions that in this case there were 2 identifiable instances of conduct that gave rise to 9 contraventions and that the respondents shouldn't be punished twice for the same offence.

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[49] see para 55 of applicant's submission and the authorities cited therein

88. Counsel for the applicant noted the admitted facts here were not a case of a single course of conduct leading to the commission of 2 different offences. Counsel for the applicant argued in this case the admitted conduct was multiple counts of the same offence.

89. In this case not only have 9 individual employees been separately affected by conduct in breach of s.400(5) but the respondents accepted that was the case.[50]

90. In this case the respondents have explicitly accepted there were 9 separate contraventions of s.400(5) by both the First and Second Respondents. In the circumstances the appropriate course is to take that into account when considering the application of the totality principle.[51]

91. Counsel for the applicant in submissions suggested in relation to the contraventions of s.400(5) they fell within the low to mid range of $10,000 to $15,000.

92. As already noted the parties agreed in relation to the contraventions of s.792 the appropriate course would be to make declarations but to impose penalities only in respect of the contraventions of s.400(5).

93. In submissions before the Court, Counsel for the applicant took the position that only a nominal penalty of $2,000 was called for in relation to the contraventions of s.342. Neither party submitted there should be a discount applied to this nominal penalty or that there was only one course of conduct. I accept this is appropriate and will not apply any further discount for that amount given the position of the parties before the Court and will factor this in at the totality stage.

94. Counsel for the applicant had submitted there should be a discount of between 20-25% for the respondent's early admissions and conduct in litigation. However in this case I am inclined to the view that a discount of 30% is appropriate.

95. In the circumstances there should also be a discount for the size of the business and the impact of the penalty. Having considered the evidence

[50] see approach in *Jones v Hanssen Pty Ltd* [2008] FMCA 291 and *Brobbel v Darrel Lea Chocolate Shops Pty Ltd* [2008] FMCA 714
[51] see *Mornington Inn Pty Ltd v Jordan* [2008] FLA FC 70 at [58]

and the submissions of the respondents a discount of 30% is in my view appropriate for this given their size, profitability and the impact of the size of the penalty on their ability to trade.[52]

96. In the ultimate then, and having regard to the position of the applicant and the matters set out above, there would be a penalty imposed on the First Respondent for the nine breaches of s.400(5) in the amount of $55,125.00.

97. For the same reasons there would be a penalty imposed on the Second Respondent for the nine breaches of s.400(5) in the amount of $9,922.50.

98. As referred to earlier in relation to the breaches of s.342 by the First Respondent a nominal penalty of $2,000 will be imposed.

99. When viewed against the background of the maximum for the breaches the applicant contends should be dealt with (of $686,400) this sees a total penalty of $67,047.50 being imposed on the First and Second Respondents being just over 10% of the maximum.

100. Turning then to the totality principle which is designed to ensure that the aggregate of the penalties to be imposed for the admitted conduct is not such as to be oppressive or crushing. At this stage the Court is required to consider whether that penalty is an appropriate response to the conduct in question.

101. Applying the principles in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*[53] and *Mornington Inn Pty Ltd v Jordan*,[54] the totality of the conduct and the discounts already obtained (including that the breaches of s.792 arose from the same course of conduct as the breach of s 400(5)) I am satisfied a discount of around 10.5% for the totality principle will ensure the penalty is not out of proportion to the conduct in question takes account of the relevant common factors and is not crushing. In coming to that view I have not ignored the evidence of the respondents regarding the impact of the penalty nor the extent the Second Respondent is involved in the management of the First

[52] see *Australian Competition and Consumer Commissions v ABB Transmissions and Distribution Ltd (No 2) & Ors* 190 ALR 169 at 183
[53] (2008) 165 FCR 560
[54] (2008) 168 FCR 383

Respondent. I am satisfied that a just and appropriate figure for the overall penalty to be imposed is $60,000. It will be apportioned as follows:

a) $51,601.25 on the First Respondent for breaches of s.400(5);

b) $6,398.75 on the Second Respondent for breaches of s.400(5); and

c) $2,000 on the First Respondent for breaches of s.342.

Conclusion

102. In the SOAF the parties agreed having regard to the above matters the appropriate orders were:

> *"1. Declarations that the First Respondent contravened the WR Act as set out in paragraphs 72 to 98 and 145 above.*
>
> *2. Declarations that the Second Respondent contravened the WR Act as set out in paragraphs 99 to 125 above.*
>
> *3. An order under section 407 of the WR Act that the First Respondent pay penalties in respect of the contraventions specified in paragraph 73,76, 79, 82, 85, 88, 91, 94 and 79 above.*
>
> *4. An order under section 407 of the WR Act that the Second Respondent pay penalties in respect of the contraventions specified in paragraphs 100, 103, 105, 108, 111, 114, 117, 120 and 123 above.*
>
> *5. An order under section 407 of the WR Act that the First Respondent pay penalties in respect of the contraventions specified in paragraph 146 above.*
>
> *6. An order that the Respondents pay the penalties to the Consolidated Revenue Fund of the Commonwealth in accordance with section 841(a) of the WR Act.*
>
> …"

103. As set out earlier the parties had agreed there should be declarations regarding the contraventions of s.400(5) of the WR Act by the First and Second Respondents. In *Ponzio* (supra) the Full Court made declarations on the basis of facts established by an agreed statement of

facts. Given this it is appropriate to do the same in this case to explain the conduct giving rise to the penalties.

104. Finally, both Counsel told the Court it was difficult to make submissions on the timing for the payment of any penalty in the absence of that figure being determined. Counsel for the applicant had told the Court his client would be amenable to a payment plan over 8 months for any penalty. Counsel for the respondent told the Court he was instructed his client could pay any penalty at $500 per month.

105. In the circumstances I am prepared to allow the penalties to be paid within 8 months by any plan agreed but otherwise in full by that date.

106. For the reasons set out above I make the orders set out at the beginning of these reasons for decision noting finally there will be as agreed no order as to costs as none were sought by the applicant.

I certify that the preceding one hundred and six (106) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM

Deputy Associate: Haylee Hobbs

Date: 7 July 2009

ANNEXURE A

IN THE FEDERAL MAGISTRATES

COURT OF AUSTRALIA

File number **LNG 1 of 2009**

THE WORKPLACE OMBUDSMAN
Applicant

PRIMROSE DEVELOPMENT COMPANY PTY LTD

(ACN 062 713 811)
First Respondent

JUDITH SIMMONDS

Second Respondent

STATEMENT OF AGREED FACTS

1. The Applicant:

   (a) is a Workplace Inspector by force of subsection 167(1A) of the *Workplace Relations Act 1996* (Cth) (WR Act); and

   (b) has functions under section 166B of the WR Act that include instituting proceedings to enforce Commonwealth workplace relations legislation.

2. The Applicant has standing to apply to the Court for:

   (a) an order under section 407 of the WR Act for payment of a pecuniary penalty in relation to a contravention of section 400(5) of the WR Act;

(b) an order under section 413 of the WR Act for payment of compensation for loss or damage resulting from a contravention of section 400(5) of the WR Act;

(c) an order under section 807(1)(a) of the WR Act imposing a pecuniary penalty in relation to a contravention of section 792(1) of the WR Act;

(d) an order under section 807(1)(b) of the WR Act requiring payment of compensation for damage suffered as a result of a contravention of section 792(1) of the WR Act; and

(e) an order under section 407 of the WR Act for payment of a pecuniary penalty in relation to a contravention of section 342(1) of the WR Act.

3. The First Respondent is and was at all material times:

(a) a company incorporated in Tasmania;

(b) capable of being sued; and

(c) an employer within the meaning of section 6(1) of the WR Act.

4. The Second Respondent is and was at all material times a shareholder and director of the First Respondent.

5. The Second Respondent's husband, Peter Simmonds (**Simmonds**), is and was at all material times a shareholder and director of the First Respondent.

6. At all material times the First Respondent operated Donut King franchises in Tasmania at:

(a) the Cat & Fiddle Arcade, Hobart (**the Hobart store**);

(b) Channel Court, Kingston (**the Kingston store**); and

(c) Devonport,

(together, **the Business**).

7. At all material times the First Respondent employed staff in the Business.

8. At all material times the First Respondent employed Sally Holmes (**Holmes**), Hannah Hughes (**H Hughes**), Jarad Hughes (**J Hughes**), Millicent Derrick (**Derrick**) and Sally Dwyer (**Dwyer**) at the Hobart store.

9. At all material times the First Respondent employed Stacey Hickey (**Hickey**), Kate Allen (**Allen**), Nicole Walton (**Walton**) and Hayley Street (**Street**) at the Kingston store.

10. At all material times, the First Respondent was bound by the *Retail Trades Award* which continued to operate at all material times as a Notional Agreement Preserving a State Award in respect of its employment of staff in the Business (**NAPSA**).

11. At all material times the NAPSA was an industrial instrument within the meaning of s 779 of the WR Act.

12. At all material times, the NAPSA amongst other things prescribed penalty rates for overtime and work performed on weekends and public holidays.

13. In or about March 2007 the First Respondent offered Australian Workplace Agreements (**AWAs**) to staff employed in the Business.

CONTRAVENTIONS OF DURESS AND FREEDOM OF ASSOCIATION PROVISIONS

Hobart store

14. In or about March 2007, the Second Respondent and Simmonds held a meeting of staff employed at the Hobart store including Holmes, H Hughes, J Hughes, Derrick and Dwyer (**the Hobart staff meeting**).

15. At or around the time of the Hobart staff meeting the Second Respondent and Simmonds provided staff at the Hobart store with copies of AWAs on exactly the same terms.

16. In the course of the Hobart staff meeting, the Second Respondent and Simmonds, amongst other things, told the staff attending the meeting that the First Respondent had decided to offer AWAs to staff at the Hobart store.

17. In the course of the Hobart staff meeting the Second Respondent and Simmonds told the staff attending the meeting that the AWAs provided for flat hourly rates of pay and no penalty rates, and there was no room for negotiation of the rates of pay to be paid under the AWAs.

18. In the course of the Hobart staff meeting the Second Respondent said, in answer to questions about what would happen if staff did not sign the AWAs, words to the effect:

    (a) staff who did not sign would not get any shifts;

    (b) she had a stack of résumés "that high" at home; and

    (c) there were plenty of people who would work under the agreement.

Sally Holmes

19. As at March 2007, Holmes was employed by the First Respondent as a retail sales assistant on a casual basis.

20. Holmes was born on 28 August 1987 and in March 2007 she was 19 years old.

21. As at March 2007, Holmes performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

22. As at March 2007, Holmes' usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

23. As a result of the conduct of the Respondents set out in paragraphs 16 to 19, Holmes signed the AWA on 6 March 2007.

Hannah Hughes

24. As at March 2007, H Hughes was employed by the First Respondent as a retail sales assistant on a casual basis.

25. H Hughes was born on 10 July 1987 and in March 2007 she was 19 years old.

26. As at March 2007, H Hughes performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

27. As at March 2007, H Hughes' usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

28. As a result of the conduct of the Respondents set out in paragraphs 15 to 18, H Hughes signed the AWA on 31 March 2007.

Jarad Hughes

29. As at March 2007, J Hughes was employed by the First Respondent as a retail sales assistant on a casual basis.

30. J Hughes was born on 17 September 1988 and in March 2007 he was 18 years old.

31. As at March 2007, J Hughes performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

32. As at March 2007, J Hughes' usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

33. As a result of the conduct of the Respondents set out in paragraphs 16 to 19, J Hughes signed the AWA on 31 March 2007.

Millicent Derrick

34. As at March 2007, Derrick was employed by the First Respondent as a retail sales assistant on a casual basis.

35. Derrick was born on 2 January 1989 and in March 2007 she was 18 years old.

36. As at March 2007, Derrick performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

37. As at March 2007, Derrick's usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

38. As a result of the conduct of the Respondents set out in paragraphs 16 to 19, Derrick signed the AWA on 19 March 2007.

Sally Dwyer

39. As at March 2007, Dwyer was employed by the First Respondent as a retail sales assistant on a casual basis.

40. Dwyer was born on 9 October 1991 and in March 2007 she was 15 years old.

41. As at March 2007, Dwyer performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

42. As at March 2007, Dwyer's usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

43. As a result of the conduct of the Respondents set out in paragraphs 16 to 19, Dwyer signed the AWA on 16 March 2007.

Kingston store

44. In or about March 2007, the Second Respondent and Simmonds held a meeting of staff employed at the Kingston store including Hickey, Allen, Walton and Street (**the Kingston staff meeting**).

45. At or around the time of the Kingston staff meeting the Second Respondent and Simmonds provided staff at the Kingston store with copies of AWAs on exactly the same terms.

46. In the course of the Kingston staff meeting, the Second Respondent and Simmonds, amongst other things, told the staff attending the meeting that the First Respondent had decided to offer AWAs to staff at the Kingston store.

47. In the course of the Kingston staff meeting the Second Respondent and Simmonds told the staff attending the meeting that the AWAs provided for flat hourly rates of pay and no penalty rates, and that there was no room for negotiation of the rates of pay to be paid under the AWAs.

48. In the course of the Kingston staff meeting the Second Respondent said, in answer to questions about what would happen if staff did not sign the AWAs, words to the effect:

    (a) staff who did not sign would not be guaranteed any shifts;

    (b) she got lots of résumés across her desk; and

    (c) there were plenty of people who would work under the agreement.

Stacey Hickey

49. As at March 2007, Hickey was employed by the First Respondent as a retail sales assistant on a casual basis.

50. Hickey was born on 28 November 1990 and in March 2007 she was 16 years old.

51. As at March 2007, Hickey performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

52. As at March 2007, Hickey's usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

53. Hickey also performed additional work during school holidays and Christmas holidays.

54. As a result of the conduct of the Second Respondent set out in paragraphs 46 to 49, Hickey signed the AWA on 20 March 2007.

Kate Allen

55. As at March 2007, Allen was employed by the First Respondent as a retail sales assistant on a casual basis.

56. Allen was born on 26 September 1989 and in March 2007 she was 17 years old.

57. As at March 2007, Allen performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

58. As at March 2007, Allen's usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

59. As a result of the conduct of the Second Respondent set out in paragraphs 46 to 49, Allen signed the AWA on 1 April 2007.

Nicole Walton

60. As at March 2007, Walton was employed by the First Respondent as a retail sales assistant on a casual basis.

61. Walton was born on 23 September 1987 and in March 2007 she was 19 years old.

62. As at March 2007, Walton performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

63. As at March 2007, Walton's usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

64. As a result of the conduct of the Second Respondent set out in paragraphs 46 to 49, Walton signed the AWA on 20 March 2007.

Hayley Street

65. As at March 2007, Street was employed by the First Respondent as a retail sales assistant on a casual basis.

66. Street was born on 20 January 1990 and in March 2007 she was 17 years old.

67. As at March 2007, Street performed duties and was paid in accordance with the 'Retail Employee Grade 2' classification under the NAPSA.

68. As at March 2007, Street's usual rostered hours of work per week regularly included shifts that attracted penalty rates under the NAPSA.

69. Street did not sign the AWA.

70. Even though Street did not sign the AWA, her wage rates were changed to those payable under the AWA in or about late April or early May 2007.

Contraventions by the First Respondent

71. At all material times, the Second Respondent was acting as an officer, director, employee and/or agent of the First Respondent within the scope of her actual or apparent authority so that, under section 826(2) of the WR Act, conduct engaged in by the Second Respondent is also taken to have been engaged in by the First Respondent.

Hobart store

72. By engaging in the conduct set out in paragraph 19the First Respondent applied duress to Holmes in connection with her AWA, in contravention of section 400(5) of the WR Act.

73. By engaging in the conduct set out in paragraph 19the First Respondent threatened to injure Holmes in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

74. By engaging in the conduct set out in paragraph 19the First Respondent threatened to alter Holmes' position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

75. By engaging in the conduct set out in paragraph 19the First Respondent applied duress to H Hughes in connection with her AWA, in contravention of section 400(5) of the WR Act.

76. By engaging in the conduct set out in paragraph 19the First Respondent threatened to injure H Hughes in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

77. By engaging in the conduct set out in paragraph 19the First Respondent threatened to alter H Hughes' position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

78. By engaging in the conduct set out in paragraph 19the First Respondent applied duress to J Hughes in connection with his AWA, in contravention of section 400(5) of the WR Act.

79. By engaging in the conduct set out in paragraph 19the First Respondent threatened to injure J Hughes in his employment for the reason that he was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

80. By engaging in the conduct set out in paragraph 19the First Respondent threatened to alter J Hughes' position to his prejudice for the reason that he was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

81. By engaging in the conduct set out in paragraph 19the First Respondent applied duress to Derrick in connection with her AWA, in contravention of section 400(5) of the WR Act.

82. By engaging in the conduct set out in paragraph 19 the First Respondent threatened to injure Derrick in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

83. By engaging in the conduct set out in paragraph 19, the First Respondent threatened to alter Derrick's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

84. By engaging in the conduct set out in paragraph 19, the First Respondent applied duress to Dwyer in connection with her AWA, in contravention of section 400(5) of the WR Act.

85. By engaging in the conduct set out in paragraph 19, the First Respondent threatened to injure Dwyer in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

86. By engaging in the conduct set out in paragraph 19, the First Respondent threatened to alter Dwyer's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

Kingston store

87. By engaging in the conduct set out in paragraph 49, the First Respondent applied duress to Hickey in connection with her AWA, in contravention of section 400(5) of the WR Act.

88. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to injure Hickey in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

89. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to alter Hickey's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

90. By engaging in the conduct set out in paragraph 49, the First Respondent applied duress to Allen in connection with her AWA, in contravention of section 400(5) of the WR Act.

91. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to injure Allen in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

92. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to alter Allen's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

93. By engaging in the conduct set out in paragraph 49, the First Respondent applied duress to Walton in connection with her AWA, in contravention of section 400(5) of the WR Act.

94. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to injure Walton in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

95. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to alter Walton's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

96. By engaging in the conduct set out in paragraph 49, the First Respondent applied duress to Street in connection with her AWA, in contravention of section 400(5) of the WR Act.

97. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to injure Street in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

98. By engaging in the conduct set out in paragraph 49, the First Respondent threatened to alter Street's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

Contraventions by Second Respondent

Hobart store

99. By engaging in the conduct set out in paragraph 19, the Second Respondent applied duress to Holmes in connection with her AWA, in contravention of section 400(5) of the WR Act.

100. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to injure Holmes in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

101. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to alter Holmes' position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

102. By engaging in the conduct set out in paragraph 19, the Second Respondent applied duress to H Hughes in connection with her AWA, in contravention of section 400(5) of the WR Act.

103. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to injure H Hughes in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

104. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to alter H Hughes' position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

105. By engaging in the conduct set out in paragraph 19, the Second Respondent applied duress to J Hughes in connection with his AWA, in contravention of section 400(5) of the WR Act.

106. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to injure J Hughes in his employment for the reason that he was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

107. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to alter J Hughes' position to his prejudice for the reason that he was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

108. By engaging in the conduct set out in paragraph 19, the Second Respondent applied duress to Derrick in connection with her AWA, in contravention of section 400(5) of the WR Act.

109. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to injure Derrick in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

110. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to alter Derrick's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

111. By engaging in the conduct set out in paragraph 19, the Second Respondent applied duress to Dwyer in connection with her AWA, in contravention of section 400(5) of the WR Act.

112. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to injure Dwyer in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

113. By engaging in the conduct set out in paragraph 19, the Second Respondent threatened to alter Dwyer's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

Kingston store

114. By engaging in the conduct set out in paragraph 49, the Second Respondent applied duress to Hickey in connection with her AWA, in contravention of section 400(5) of the WR Act.

115. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to injure Hickey in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

116. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to alter Hickey's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

117. By engaging in the conduct set out in paragraph 49, the Second Respondent applied duress to Allen in connection with her AWA, in contravention of section 400(5) of the WR Act.

118. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to injure Allen in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

119. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to alter Allen's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

120. By engaging in the conduct set out in paragraph 49, the Second Respondent applied duress to Walton in connection with her AWA, in contravention of section 400(5) of the WR Act.

121. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to injure Walton in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

122. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to alter Walton's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

123. By engaging in the conduct set out in paragraph 49, the Second Respondent applied duress to Street in connection with her AWA, in contravention of section 400(5) of the WR Act.

124. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to injure Street in her employment for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(b) of the WR Act.

125. By engaging in the conduct set out in paragraph 49, the Second Respondent threatened to alter Street's position to her prejudice for the reason that she was entitled to the benefit of an industrial instrument (the NAPSA), in contravention of section 792(1)(c) of the WR Act.

Loss and damage

126. As a result of the contraventions of the Respondents referred to in paragraphs 73 to 126, each of J Hughes, Dwyer, Hickey and Street have suffered loss and damage.

Jarad Hughes

127. J Hughes was paid in accordance with the terms of the AWA from the week commencing 23 April 2007 to the week commencing 17 November 2008.

128. The amount that J Hughes ought to have received under the NAPSA for shifts worked in the period referred to in paragraph 128 was $21,504.17. J Hughes received $20,642.57 during that period.

129. The difference between the amount that ought to have been paid under the NAPSA, and the amount received by J Hughes, is $861.59.

130. This amount has been paid.

Sally Dwyer

131. Dwyer was paid in accordance with the terms of the AWA from the week commencing 23 April 2007 to the week commencing 1 September 2007. Dwyer then ceased employment with the Business.

132. The amount that Dwyer ought to have received under the NAPSA for shifts worked in the period referred to in paragraph 132 was $8,590.96. Dwyer received $7,453.60 during that period.

133. The difference between the amount that ought to have been paid under the NAPSA, and the amount received by Dwyer, is $1,137.37.

134. This amount has been paid.

Stacey Hickey

135. Hickey was paid in accordance with the terms of the AWA from the week commencing 23 April 2007 to the week commencing 21 April 2008. Hickey then ceased employment with the business.

136. The amount that Hickey ought to have received under the NAPSA for shifts worked in the period referred to in paragraph 136 was $7,253.78. Hickey received $6,790.56 during that period.

137. The difference between the amount that ought to have been paid under the NAPSA, and the amount received by Hickey, is $463.22.

138. This amount has been paid.

Hayley Street

139. Street was paid in accordance with the terms of the AWA from the week commencing 23 April 2007 to the week commencing 6 August 2007. Street then ceased employment with the Business.

140. The amount that Street ought to have received under the NAPSA for shifts worked in the period referred to in paragraph 140 was $1,812.79. Street received $1,784.32 during that period.

141. The difference between the amount that ought to have been paid under the NAPSA, and the amount received by Street, is $28.47.

142. This amount has been paid.

CONTRAVENTIONS IN RELATION TO LODGEMENT OF AWAS

143. AWAs between the First Respondent and:

(a) Stacey Hickey;

(b) Nicole Walton;

(c) Sally Holmes;

(d) Hannah Hughes;

(e) Jarad Hughes;

(f) Sarah Cooper;

(g) Amy Tiitinen;

(h) Alex White;

(i) Rebecca Goodluck;

(j) Nikki Belstead;

(k) Rebecca De Groot;

(l) Alexandra Guy;

(m) Olivia Harris;

(n) Tendai Debrauwere-Krohn;

(o) Ellie Roe;

(p) Sara Wakeling;

(q) Chantelle Boon;

(r) Carly Newnes;

(s) Jessica Porch; and

(t) Christopher Winter,

(**the employees**) were approved on or about 18 April 2007.

144. On or about 26 April 2007 the First Respondent lodged with the Employment Advocate (now the Director of the Workplace Authority) declarations under section 344(2) of the WR Act in respect of its AWAs with the employees, without annexing a copy of the AWA to the relevant declaration as required by section 344(1)(b) of the WR Act.

145. In contravention of section 342(1) of the WR Act the First Respondent did not lodge its AWAs with the employees in accordance with section 344 of the WR Act.

ORDERS AGREED

1. Declarations that the First Respondent contravened the WR Act as set out in paragraphs 72 to 98 and 145 above.

2. Declarations that the Second Respondent contravened the WR Act as set out in paragraphs 99 to 125 above.

3. An order under section 407 of the WR Act that the First Respondent pay penalties in respect of the contraventions specified in paragraphs 73, 76, 79, 82, 85, 88, 91, 94 and 97 above.

4. An order under section 407 of the WR Act that the Second Respondent pay penalties in respect of the contraventions specified in paragraphs 100, 103, 105, 108, 111, 114, 117, 120 and 123 above.

5. An order under section 407 of the WR Act that the First Respondent pay penalties in respect of the contraventions specified in paragraph 146 above.

6. An order that the Respondents pay the penalties to the Consolidated Revenue Fund of the Commonwealth in accordance with section 841(a) of the WR Act.

7. Orders under section 413 of the WR Act that the Respondents pay compensation to each of J Hughes, Dwyer, Hickey and Street for loss and damage suffered by them as a result of the Respondents' contraventions of section 400(5) of the WR Act in the amounts specified in paragraphs 130, 134, 138, and 142 above (as relevant to each employee).

8. Any further order that the Court considers appropriate.

MATTERS FOR JOINT SUBMISSIONS

1. The parties agree that the breaches of section 792(1) of the WR Act arose out of the same course of conduct as the breaches of section 400(5) of the WR Act. It is their common position that whilst the matters constituting breaches of section 792(1) of the WR Act can be taken into account in assessing the nature of the breaches of section 400(5) of the WR Act, no penalty, additional to that imposed in respect of the breaches of section 400(5), should be imposed in respect of the breaches of section 792(1) of the WR Act.

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Clayton Utz
Solicitors for the Applicant

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Simmons Wolfhagen
Solicitors for the First and Second Respondents